IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 13818 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE KS JHAVERI

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PATEL HIMANSHUBHAI BHOGILAL - Applicant(s)
Versus
STATE OF GUJARAT & 4 - Respondent(s)

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Appearance :

MR PRAKASH K JANI for Applicant(s) : 1,
PUBLIC PROSECUTOR for Respondent(s) : 1,
MR SHAKEEL A QURESHI for Respondent(s) : 2,
RULE NOT RECD BACK for Respondent(s) : 3,
RULE UNSERVED for Respondent(s) : 4,
MS VARSHA BRAHMBHATT for Respondent(s) : 5,

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CORAM : HONOURABLE MR.JUSTICE KS JHAVERI

Date : 22/03/2007

ORAL JUDGMENT

1. By way of this application the applicant has prayed to quash and set aside the summons issued in connection with the offence punishable under Section 138 of the Negotiable Instruments Act, as well as the order below Exh. 52 in Criminal Case No. 4020 of 2004, passed by the learned JMFC, Mehsana dated 03.10.2005 and the judgement and order passed by the

learned Principal Sessions Judge, Mehsana dated 19.11.2005 in Criminal Revision Application No. 100 of 2005.

2. The short facts of the case are that the partnership firm named Shivam Investments, was engaged the share brokers and the partners thereof are (1) Patel Kaushikkumar Parshottamdas (2) Modi Mukeshkumar Ramanlal (3) Patel Vijaykumar Parshottamdas (4) Patel Himanshu Bhogilal (applicant herein). The applicant is having 20% share in the said partnership. Two persons have issued cheques namely Kaushikkumar Parshottamdas Patel and Mukeshkumar Ramanlal Modi in favour of one Kaushikkumar Rasiklal Modi. The said cheque was returned on 1st March, 2004 on the ground that funds were insufficient. The same was again presented and again returned on 17th March 2004 with the endorsement that the payment is stopped by the drawer.

2.1 On 5th March 2004 another cheque was issued by the same persons in favour of Kaushikkumar Rasiklal Modi which was also returned with intimation that

payment was stopped by the drawer. Who is signatory to these cheques. On 23rd August, 2004 a notice came to be issued by the payee of the aforesaid cheques through his advocate, demanding the amount from the partners of the firm named as Shivam Investments. Thereafter Criminal Case No. 4020 of 2004 came to be filed by Kaushik Rasiklal Modi in the court of learned Chief Judicial Magistrate, at Mehsana. The complaint was filed under section 138 of the Negotiable Instruments Act. In the said complaint, the complainant has categorically stated that he has no transaction with Shri Himanshu Bhogilal Patel nor he has ever met him.

2.2 On 2nd May 2005 learned advocate for the accused no. 2 Kaushikkumar Parshottamdas Patel gave an application being Application Exh. 52 in the court of Chief Judicial Magistrate, Mehsana, stating that the applicant be also joined as accused. Accused no. 2, who was summoned, raised the plea that the applicant is the partner of the firm. The learned Chief Judicial Magistrate, Mehsana, by order dated 2nd May, 2005, issued notice to the applicant and fixed the

hearing on 16th May 2005. Thereafter by order dated 3rd October, 2005 learned Judicial Magistrate, First Class, Mehsana granted the said application exh. 52 and directed that the applicant be joined as accused no. 4 in the complaint. The applicant therefore filed revision application, being Criminal Revision application No. 100 of 2005 in the court of Session Judge, Mehsana. The same was admitted by order dated 29th October 2005. The revision application was finally heard by the learned Principal Sessions Judge, Mehsana and the same was dismissed vide order dated 19th November, 2005. Therefore, the present application filed under section 482 of the Code of Criminal Procedure read with Article 226 and 227 of the Constitution of India.

3. Learned advocate for the applicant has submitted that the applicant is not in-charge and responsible for the affairs of the partnership firm called Shivam Investments. The applicant was not signatory to the three cheques issued which were returned. The applicant had 20% share in the affairs of the said partnership firm but the said partnership has been

dissolved and on 14th February 2004, as the applicant had retired. he therefore, submitted that there cannot be any liability of the applicant with respect to the dues and the cheques which have been issued after 14th February 2004. The cheques were issued on the 28th February, 2004, 1st March 2004 and 5th March 2004.

3.1 He has relied upon a decision of the Apex Court in the case of ***S.M.S. Pharmaceuticals Ltd.1 V/s. Neeta Bhalla & anr.*** reported in ***(2005) 8 S.C.C. 89*** wherein it has been held that it is necessary to aver in the complaint filed in respect thereof that at the time when the offence was committed, the person accused was in-charge of and responsible for the conduct of business of the Company. Without such averment being made in the complaint, the requirements of Section 141 of the Negotiable Instruments Act, 1881 cannot be said to be satisfied. Learned counsel has relied upon the observations made in Paras 19 (a) & (b) of the said decision are relevant, which reads as under;

> ***"19. In view of the above discussion, our answers to the questions posed in the***

reference are as under;

(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to the question posed in sub-para (b) has to be in the negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a Company cannot be deemed to be in charge of and responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases."

3.2 He further submitted that in view of the provisions of section 141 no allegations are levelled against the present applicant. The firm named as Shivam Investments would be a company within the meaning of Section 141 of the Negotiable Instruments Act and, therefore, the complainant is required to prosecute the person who was in-charge and was responsible to the company for the conduct of its business.

3.3 In the instant case, admittedly, as per the say of the complainant, the applicant was not in charge and was not responsible for the affairs of the company and for the conduct of the business of the company. In view of the same, the complainant himself has admitted that the applicant is not responsible for the affairs of the company. Therefore, by no stretch of imagination, the applicant can be said to be the accused for the offfence punishable under section 138 of the Negotiable Instruments Act on the ground that the applicant was the partner at some point of time in the past when the cheques have been issued subsequent to the retirement of applicant as partner.

4. Learned advocate for the complainant has relied upon the decision of the apex court in the case of Lok Ram vs. Nihalsingh and another reported in 2006(3) SCC (Cri) 532 wherein it is held that:

> ***"Under sub-section (4)(1)(b) of Section 319 of Cr. P.C., it is specifically made clear that it will be presumed that newly added person had been an accused person when the court took cognizance of the offence upon which the inquiry or trial was commenced.***

> ***That would show that by virtue of sub-section (4)(1)(b) a legal fiction is created that cognizance would presumed to have been taken so far as newly added accused is concerned."***
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> ***The power is discretionary and such discretion must be exercised judicially having regard to the facts and circumstances of the case. Undisputedly, it is an extraordinary power which is conferred on the court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier"***

5. As a result of hearing and perusal of the records I am of the view that the notice was not given to the applicant under section 138 of the Negotiable Instruments Act he was only informed about the payment. Even otherwise the cheque no. 738444 dated 01.03.2004 for the sum of Rs. 1,00,000/- was not signed by the applicant. Apart from that the complainant himself has not shown the applicant as an accused. Therefore, the summons as well as the order below Exh. 52 in Criminal Case No. 4020 of 2004, and the judgement and order dated 19.11.2005 in Criminal Revision Application No. 100 of 2005 are required to be quashed and set aside. Further on the facts of the case the decision relied by the counsel for the complainant is not applicable in this case.

5.1 In the premises aforesaid this application is allowed. the summons as well as the order below Exh. 52 in Criminal Case No. 4020 of 2004, and the judgement and order dated 19.11.2005 in Criminal Revision Application No. 100 of 2005 are hereby quashed and set aside qua present applicant. Rule is made absolute.

(K.S.JHAVERI,J.)

Suresh*